United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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74-2392

United States Court of Appeals

FOR THE SECOND CIRCUIT

PHILLIP A. FERRATO, individually and as President of the New York State Parkway Police Benevolent Association of Long Island, Inc., and the NEW YORK STATE PARKWAY POLICE BENEVOLENT ASSOCIATION OF LONG ISLAND, INC.,

Plaintiffs-Appellants,

—against—

MALCOLM WILSON, as Governor the State of New York, and the STATE OF NEW YORK PUBLIC EMPLOYMENT RELATIONS BOARD,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of New York

BRIEF OF PLAINTIFFS-APPELLANTS

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Background of the Case

This Appeal, taken by Plaintiffs-Appellants, is from a decision by the Honorable Justice James T. Foley, United States District Court, Judge for the Northern District of New York, said decision being dated July 31, 1974, which granted Defendants-Appellees' motion dismissing Plaintiffs-Appellants' complaint which sought an order directing the Defendants-Appellees to recognize the New York State Parkway Police Benevolent Association of Long Island, Inc., as the exclusive recognized bargaining unit

of the Long Island State Parkway Police pursuant to Section 207 of Article 14 of the Civil Service Law of the State of New York.

Initially, Plaintiff-Appellant, Phillip A. Ferrato, individually and as President of the New York State Parkway Police Benevolent Association of Long Island, Inc., brought in the District Court for the Northern District of New York, a lawsuit pursuant to 28 USC 1343 (3) and 42 USC Section 1983 alleging that the Defendants-Appellees named herein violated their civil rights under the "Fifth" and "Fourteenth" amendments to the United States constitution. Suit was commenced in the District Court by filing a complaint on March 27, 1974.

In response to Plaintiffs-Appellants' complaint, Defendants-Appellees brought a motion in the District Court of the Northern District Court of New York returnable on May 20, 1974 seeking to have Plaintiffs-Appellants' complaint dismissed upon the grounds that:

> (1) The court lacked jurisdiction over the subject matter.
>
> (2) The complaint failed to state a claim upon which relief could be granted, to wit:
>
> (a) The action was barred by res judicata.
>
> (b) The action was barred by the statute of limitations in the New York Civil Service Law, Section 213 (a) and the New York Civil Practice Laws and Rules, Section 217.
>
> (c) That Plaintiffs-Appellants failed to exhaust their administrative remedies.
>
> (3) Plaintiffs-Appellants failed to join a party under Rule 19.

As a result of said motion to dismiss, the Honorable Justice James T. Foley, District Court Judge of the Dis-

trict Court of the Northern District of New York in a Memorandum-Decision and Order dated July 31, 1974, granted Defendants-Appellees' motion and dismissed Plaintiffs-Appellants' complaint. On August 12, 1974 Plaintiffs-Appellants filed a Notice of Appeal with the United States Court of Appeals for the Second Circuit with regard to the Memorandum-Decision and Order of the Honorable Justice James T. Foley, dated July 31, 1974, said appeal being the basis for the proceedings currently before this court.

Questions Presented

Whether or not the lower court was correct in dismissing Plaintiffs-Appellees' complaint based upon the following determinations:

1. That Plaintiffs-Appellees were barred from commencing said law suit based upon a three-year statute of limitations;

2. That Plaintiffs-Appellees were barred from commencing said law suit based upon the applicability of the legal concept of res judicata;

3. That Plaintiffs-Appellees failed to state in their complaint a claim upon which relief could be granted.

Facts

Plaintiff-Appellant, Philip A. Ferrato, was and still is employed as a Long Island State Parkway Police Officer, having been appointed to said position on February 28, 1958, and at the time of the commencement of this action, was the president of the New York State Parkway Police Benevolent Association of Long Island, Inc.

As a result of a determination by the State of New York Public Employment Relations Board, all Long Island

State Parkway Police were assigned, for the purposes of collective bargaining, to the "Security Unit", said unit being designated as the recognized and/or certified negotiating unit representative of all Long Island State Parkway Police as to negotiations with the State of New York as to the terms and conditions of employment for said police.

The Security Unit comprises approximately 8,500 employees, approximately 200 of which are Long Island State Parkway Police Officers.

That as a result of the fact that said Long Island State Parkway Police Officers comprise less than three percent of said Security Unit, they effectively have no voice with regard to negotiating their terms and conditions of employment.

As a result of this inequity Plaintiffs-Appellants sought relief by the commencement of a suit in the Federal District Court for the Northern District of New York alleging a violation of their constitutional guarantees as set forth in the Fifth and Fourteenth Amendments to the United States Constitution.

Prior to the commencement of this lawsuit, the New York State Parkway Police Benevolent Association of Long Island, Inc., attempted to petition the New York State Public Employment Relations Board for a determination which would decertify said Security Unit as being the collective bargaining representative for the New York State Parkway Police. The petition seeking decertification was not acted upon by PERB since it was determined to be untimely, said petition being denied on September 16, 1970.

In response thereto, the New York State Parkway Police Benevolent Association of Long Island, Inc., instituted an Article 78 proceeding within the New York State Su-

preme Court challenging the action of PERB in denying, as untimely, the decertification petition. This lawsuit was also dismissed as untimely, and as presenting no significant legal question since the issues raised therein were claimed to have already been previously decided. *Matter of Civil Service Employees Association, Inc.* v. *Helsby,* 32 A.D. 131 (3rd Dept. 1969), aff'd 25 N.Y. 2d 842 (1969). *Matter of Rupp* v. *Klein,* N.Y. Supreme Ct., Albany County, June 15, 1970, unreported.

Upon the occurrence of the above, the New York State Parkway Police Benevolent Association of Long Island, Inc. then instituted a suit in the New York State Supreme Court raising the issue of the constitutionality upon which PERB was created and the bargaining units determined. These challenges were not fruitful and the statutes in question were declared to be constitutional. *Matter of Rupp* v. *Rockefeller,* 4 PERB 7005, N.Y. Supreme Ct., Albany County, January 22, 1971, unreported.

It is upon this background that Plaintiffs-Appellants instituted the proceeding in question.

POINT ONE

It is respectfully submitted to this court that Plaintiffs-Appellants were not barred from instituting the suit herein by the three-year statute of limitations as determined by the lower court since Plaintiffs-Appellants respectfully submit to this court that pursuant to section 213 (1) of the Civil Practice Law and Rules of the State of New York, a six-year statute of limitations is applicable under the facts and circumstances herein.

It is acknowledged by Plaintiffs-Appellants that the statute of limitations applicable to a suit brought under 42 U.S.C. Section 1983 is determined by the applicable

state law. See *Mohler* v. *Miller, et al.,* 235 F2d 153 (1956).

Under the above criteria, it is respectfully submitted that the action herein, instituted by Plaintiffs-Appellants, is best categorized as being in the form of a declaratory judgment action seeking to correct a continuing wrong and thus falls within the six-year statute of limitations set forth in section 213 (1) of the Civil Practice Law and Rules of the State of New York. See *Kirn* v. *Noyes,* 262 A.D. 581, 31 N.Y.S.2d 90, (1941); *Rosenbaum* v. *Rosenbaum,* 309 N.Y. 371 (1968).

POINT TWO

It is respectfully submitted to this court that Plaintiffs-Appellants are not barred from instituting the suit herein based upon the legal concept of res judicata. In particular, Plaintiffs-Appellants herein raise issues different from those raised in the previous litigation cited in the lower courts opinion as well as being parties separate and apart from those set forth in said previous litigation. Whereas said previous litigation attacked the constitutionality of section 207 of the Civil Service Law of the State of New York, the current proceedings attack the implementation thereof as applicable to Plaintiffs-Appellants and seeks a determination that said application is unconstitutional.

POINT THREE

It is respectfully submitted to this court that Plaintiffs-Appellants complaint alleges a claim upon which relief can in fact be granted as well as alleging a claim recognized in law. More particularly, Plaintiffs-Appellants re-

spectfully submit to this court that its constitutional guarantees related to the freedom to bargain meaningfully in a collective nature as to the terms and conditions of one's employment have been impaired by the actions of Defendants-Appellees herein and that such acts infringe constitutional guarantees recognized at law.

CONCLUSION

For the reasons stated above, Plaintiffs-Appellants respectfully submit to this Court that the decision by the Lower Court should be overturned.

Dated: Mineola, New York
November 26, 1974

Respectfully submitted,

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THE UNITED STATES COURT OF APPEALS::: FOR THE SECOND CIRCUIT

376—Affidavit of Service by Mail — The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

PHILLIP A. FERRATO, et al.,

Plaintiffs-Appellants

v.

MALCOLM WILSON..., THE NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS

Defendants-Appellees.

State of New York, County of New York, ss.:

Harold Dudash, being duly sworn deposes and says that he is agent for Richard Hartman the attorney for the above named Plaintiffs-Appellants herein. That he is over 21 years of age, is not a party to the action and resides at 2530 Young Avenue, Bronx, N.Y.

That on the 27th day of November, 1974, he served the within Appendix to Brief of Plaintiffs-Appellants and Brief of Plaintiffs-Appellants.

upon the attorneys for the parties and at the addresses as specified below

Louis J. Lefkowitz, Attorney General of the State of New York., Attorney for Defendant-Appellee, Governor Malcolm Wilson, The Capitol, Albany, N.Y. 12224

Martin L. Barr, Attorney for defendant-appellee New York State Public Employment Relations Board, 50 Wolf Road, Albany, N.Y. 12205

by depositing three copies of the brief and three of the appendix to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at 90 Church Street, New York, New York directed to the said attorneys for the parties as listed above at the addresses aforementioned, that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 27th day of November, 1974

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1976

Harold Dudash